Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SHAKEEL AHMAD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether application of the *in personam* test, articulated in *U.S. v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028 (1998), to a punitive *in rem* action violates an individual's right to due process of law as guaranteed under the Fifth Amendment of the Constitution?

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SHAKEEL AHMAD,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shakeel Ahmad respectfully petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at 213 F.3d 805, and is reproduced in the Appendix hereto ("App.") at 10A-36A. The order of the district court ruling that the forfeitures were excessive fines in violation of the Eighth Amendment, which was reversed by the circuit court, is reproduced at App. 1A-9A.

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

The texts of the Fifth, Sixth and Eight Amendments to the United States Constitution and 18 U.S.C. §§ 545 and 984 are reprinted in full in the Appendix, pursuant to Supreme Court Rule 14.1(f).

JURISDICTION

The judgment of the Fourth Circuit was entered in this case on May 25, 2000. The court of appeals denied timely petitions for rehearing and suggestion for rehearing en banc on July 21, 2000. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

This civil action arises in the aftermath of a criminal case in which the U.S. Court of Appeals for the Fourth Circuit vacated a criminal forfeiture of the funds at issue. *See United States v. Ismail,* 97 F.3d 50 (4th Cir. 1996).[1]

On or about October 25, 1993, the Government seized $167,558.86 in U.S. currency belonging to Petitioner Shakeel Ahmad, and has retained uninterrupted possession of those funds since that time, a period of nearly seven years, notwithstanding the *Ismail* decision in the interim.

In December 1993, Petitioner Ahmad filed a claim for the return of the funds, and requested a prompt hearing. One year and a day after the seizure, on October 26, 1994, there having been no hearing at all, the Government returned an indictment against Ahmad and others. The indictment

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[1] The panel which heard oral argument in *Ismail* consisted of Judges Williams, Niemeyer, and Motz, who wrote the opinion. Judge Williams wrote a concurring opinion.

included a criminal forfeiture count based upon alleged structuring of financial transactions and money laundering[2] The district court dismissed the money laundering charges on the defendants' motion. Ahmad and his co-defendants were convicted of five remaining charges, including the counts alleging that they had structured financial transactions. *See,* App. 3A.

Following the conviction, on or about January 23, 1995, the district court entered an order forfeiting the funds.[3] The United States Court of Appeals for the Fourth Circuit reversed and vacated the structuring convictions and the related criminal forfeiture on September 26, 1996.[4] *U.S. v. Ismail, supra.* On or about November 5, 1996, after the Fourth Circuit issued its mandate, Ahmad requested that the funds be returned to him. On November 12, 1996, the Government filed a civil claim for return of the money, and the district court subsequently denied Ahmad's motion.[5]

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[2] The indictment alleged that Ahmad and others had committed numerous offenses including conspiracy (18 U.S.C. § 371), structuring (18 U.S.C. § 1522), money laundering (18 U.S.C. §1956), false statements to the FDIC (18 U.S.C. § 1001), and false statements to the U.S. Customs Service (18 U.S.C. § 542). It also alleged that two of Ahmad's co-defendants (but not Ahmad) had committed tax offenses in violation of 26 U.S.C. § 7206(1).

[3] The Government based its original claim for forfeiture in the indictment solely on structuring and money laundering. The district court's forfeiture following the criminal convictions was based solely upon the structuring violations.

[4] The Fourth Circuit reversed all of Ahmad's convictions for structuring and false statements to the FDIC, but affirmed the ones for conspiracy and false statements to the Customs Service in violation of 18 U.S.C. § 542. The reversal of the structuring convictions was based on the Government's failure to prove intent, as required by this Court in *Ratzlaf v. United States,* 510 U.S. 135, 114 S.Ct. 655 (1994)

[5] The Government instituted this civil action only after Ahmad requested the return of his property, following the issuance of the mandate of the court of appeals in *Ismail.*

See, App. 4A.

The civil forfeiture complaint had three counts, each of which initially sought all of the funds. In Count I, the Government alleged that it was still entitled to the funds on the basis of the structuring activity originally charged in the criminal case, notwithstanding the fact that the conviction and related forfeiture had been reversed in *Ismail*. The Government made this assertion also despite the absence of proof that Ahmad acted "willfully" when he deposited currency in amounts under $ 10,000, and despite the Government's admission that it suffered no financial loss as a result. On appeal, under Count I, the Government sought only $85,000 of the funds, which it contended were directly traceable to structuring activity.[6]

In Count II of the civil complaint, the Government alleged a completely new theory of forfeiture, raising it for the first time only after Ahmad requested return of the funds in November, 1996. The Government asserted that all of the funds were forfeitable as substitute assets, based upon an alleged violation of 18 U.S.C. § 545, a criminal Customs statute. Significantly, the Government did not charge that Ahmad (or any of his co-defendants) had violated this statute in the predecessor criminal case. (Ahmad had been charged and convicted of violating another criminal customs statute, 18 U.S.C. § 542, which does not contain a forfeiture provision.)

Count III sought forfeiture on a common law conversion theory. The Government did not pursue Count III on appeal.

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[6] The Government initially sought forfeiture of $85,000 as directly traceable to the alleged structuring activity pursuant to 18 U.S.C. § 981(a)(1)(A), and the remaining funds as substitute assets under 18 U.S.C. § 984. On appeal, the Government conceded that it is not entitled to the forfeiture of substitute assets under § 984 on these facts

On January 21, 1998, the district court entered judgment in favor of Ahmad, relying principally upon the test for excessiveness set forth in *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994), and in a Ninth Circuit decision, *United States v. Bajakajian*, 84 F.3d 334 (9th Cir. 1996).[7] The Government appealed this order, and the Fourth Circuit applied the *Bajakajian* excessive fines test applicable to *in personam* forfeitures to this *in rem* forfeiture. On that basis, it concluded that Ahmad was not entitled to the return of his property.

The Fourth Circuit Court of Appeals ruled correctly that the *in rem* forfeiture at issue in the instant case was punitive. Following this determination, the court held that the gross proportionality test, which this Court articulated in *U.S. v. Bajakajian*, 524 U.S. 321, 336-337, 118 S.Ct. 2028, 20037-38 (1998), was appropriate for determinations of Eighth Amendment excessiveness in punitive forfeitures. The court applied this test to the facts of the instant case, and concluded that the forfeiture was not grossly disproportionate to the gravity of the offenses. In making this determination, the court placed on Ahmad the burden of demonstrating the excessiveness of the forfeiture, and found that he had failed to do so.

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[7] *Bajakajian* was affirmed by this Court, 524 U.S. 321, 118 S.Ct. 2028 (1998), after the district court rendered its decision in this case.

ARGUMENT

I. By creating a test to determine whether a forfeiture is constitutionally excessive under the Eighth Amendment, and applying it to both punitive *in rem* forfeitures and *in personam* forfeitures, the Fourth Circuit stripped an innocent owner of property without providing him the safeguards guaranteed to criminal defendants.

This Court recently indicated that the correct test for determining excessiveness under the Eighth Amendment in *in personam* forfeitures was a gross proportionality test.[8] *U.S. v. Bajakajian*, 524 U.S. 321, 336-337, 118 S.Ct. 2028, 20037-38 (1998). The Court directed that:

> [i]n applying this standard, the district courts in the first instance, and the courts of appeals, reviewing the proportionality determination de novo, must compare the amount of forfeiture to the gravity of the defendant's offense. If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional.

524 U.S. at 336-37, 118 S.Ct. at 2037-38.

In *Austin v. U.S.*, 509 U.S. 602, 113 S.Ct. 2801 (1993), Justice Scalia proposed that an instrumentality test be applied to punitive *in rem* actions. Though this test was later dismissed by this Court, *see Bajakajian*, it nevertheless set the framework for assessing excessiveness in forfeiture actions. *Austin*, 509 U.S. at 628, 113 S.Ct. 2801, 2815

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[8] Although not explicitly stated, this Court's opinion in *Bajakajian* has been interpreted to apply to both *in personam* and punitive *in rem* forfeiture actions. *U.S. v. Ahmad*, 213 F.3d 805 (4th Cir. 2000).

("[t]he relevant inquiry for an excessive forfeiture under § 881 is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, 'guilty' and hence forfeitable?") (Scalia, J. concurring).

One other approach to determining Eighth Amendment excessiveness in forfeiture actions has been reviewed by this Court. The Ninth Circuit's initial opinion in *Bajakajian* proposed a two-part test for determining excessiveness, which combined both an instrumentality test and a proportionality test. *Bajakajian*, 84 F.3d 334, 336 (9th Cir. 1996) ("[p]ursuant to this Court's Excessive Fines Clause test, a forfeiture is constitutional if (1) the property forfeited is an 'instrumentality' of the crime committed; and (2) the value of the property is proportional to the culpability of the owner.").

The Fourth Circuit's interpretation of this Court's opinion in *U.S. v. Bajakajian*, in the decision below blurred the distinction between *in rem* and *in personam* forfeitures, treating punitive *in rem* forfeitures in the same manner as criminal *in personam* forfeitures for the purposes of review under the Eighth Amendment to the U.S. Constitution,[9]

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[9] *In rem* forfeiture actions are instituted by the Government, and have traditionally been considered to attack property involved in wrongdoing, rather than the owner of that property. *Bajakajian,* 524 U.S. at 330, 118 S.Ct. 2028, 2034 ("[t]he theory behind such forfeitures was the fiction that the action was directed against 'guilty property,' rather than against the offended himself."). In contrast, *in personam* forfeiture actions are understood to be aimed at punishment of the person. Only individuals who have been adjudged guilty of a criminal offense may be punished through *in personam* proceedings. *Id.* at 331-32, 118 S.Ct. 2028, 2035 (describing the *in personam* forfeiture at issue, this Court wrote: "the Government has not proceeded against the currency itself, but has instead sought and obtained a criminal conviction of respondent personally. The forfeiture serves no remedial purpose, is designed to punish the offender, and cannot be imposed on innocent owners.").

which provides that: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

In doing so, the court of appeals has created a situation where, although not convicted of a substantive crime, a person may nonetheless have property taken under the same test that would apply to a criminal forfeiture. *See* Section D, *infra*. In the instant case, the Government has been allowed to take Ahmad's funds, even though he was found not guilty of the underlying criminal offense on which the forfeiture was based.

The application of forfeiture laws in this manner, though it may have a long history, is nevertheless deeply disturbing and should be revisited by this Court. *See Bennis v. Michigan*, 516 U.S. 442, 454, 116 S.Ct. 994, 1001 (1996) (Thomas, J. concurring) ("[a]s the court notes, evasion of the normal requirement of proof before punishment might well seem 'unfair.' ... One unaware of the history of forfeiture laws and 200 years of this Court's precedent regarding such laws might well assume that such a scheme is lawless – a violation of due process"). The fact that *in rem* forfeiture laws may have been in place for a long time does not mean that their application is not subject to constitutional scrutiny. *Marbury v. Madison*, 1 Cranch 137, 177, 2L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")

By applying the *in personam* "gross proportionality" test to punitive *in rem* forfeitures, the Fourth Circuit expanded this Court's concept of guilty property as set forth as long ago as *Various Items of Personal Property v. U.S.*, 282 U.S. 577, 581, 51 S.Ct. 282, 284 (1931). If the decision below is permitted to stand, the distinction between *in personam* and punitive *in rem* will no longer be a legal fiction, but instead an excuse for a *de facto* taking as punishment for a criminal act. This might not be so

troubling, were it not for the fact that the owner of property that is the subject of an *in rem* proceeding is not afforded the same safeguards as an *in personam* defendant in a criminal prosecution. The abrogation of constitutional and statutory rights in this manner is nothing less than a violation of punitive *in rem* claimant's due process rights, guaranteed under the Fifth Amendment to the Constitution.

A. This Court's holdings in *Austin*, *Bennis* and *Bajakajian* have established inconsistent and conflicting interpretations of forfeiture law which need to be reconciled.

In three recent decisions, this Court has created an area of uncertainty with respect to the intersection of punitive *in rem* and non-punitive *in personam* forfeiture actions. In *Austin v. U.S.*, 509 U.S. 602, 113 S.Ct. 2801 (1993), the Court recognized that some *in rem* forfeitures constitute punishment. *Austin* involved the appeal of an *in rem* forfeiture of a mobile home and an auto body shop, following a guilty plea to one count of possessing cocaine with intent to distribute. *Id.* This Court held that the Excessive Fines clause of the Eighth Amendment **does** apply to *in rem* civil forfeiture proceedings. *Id.* at 618, 113 S.Ct. 2801, 2810 ("[w]e conclude, therefore, that forfeiture generally and statutory *in rem* forfeiture in particular, historically have been understood, at least in part, as punishment."). The case was remanded to the district court for findings consistent with the Court's opinion.

In *Austin*, this Court invited lower courts to fashion their own tests for determining whether or not an *in rem* forfeiture was unconstitutionally excessive. *Austin*, 509 U.S. at 622-3, 113 S.Ct. 2801, 2812 ("[p]rudence dictates that we allow the lower courts to consider the question in the first instance"). Part of the *Austin* Court's ambivalence might be attributed to its understandable reluctance to equate criminal

guilt with civil liability. It is, at the very least, intuitively unfair to apply the same test to civil and criminal actions. In his concurrence in the *Austin* cases, Justice Scalia criticized the majority's conclusion, stating that, "[i]f this Court is correct that culpability of the owner is essential, then there is no difference (except perhaps the burden of proof) between the traditional *in rem* forfeiture and the traditional *in personam* forfeiture." *Id.* at 626, 113 S.Ct. 2801, 2814. Whether or not one accepts Justice Scalia's assessment of the emphasis on the punitive nature of *in rem* forfeitures in *Austin*, it must be acknowledged that the prospect of treating the two kinds of forfeiture similarly, in spite of their different levels of burden of proof, is constitutionally troubling.

Three years later, in *Bennis*, *supra*, this Court, implicitly rejecting its opinion in *Austin*, held that the so-called "innocent owner" defense was inappropriate, and that the *in rem* forfeiture of property involved in that case was **not** reviewable under the Eighth Amendment because it was **not** punitive. *Bennis*, 516 U.S at 451, 116 S.Ct. 994, 1000. In *Bennis*, a woman appealed the judgment of the Michigan Supreme Court following forfeiture of her car, after her husband was convicted of gross indecency in the vehicle. *Id.* This Court granted certiorari "to determine whether Michigan's abatement scheme has deprived petitioner of her interest in the forfeited car without due process, in violation of the Fourteenth Amendment, or has taken her interest for public use without compensation, in violation of the Fifth Amendment as incorporated by the Fourteenth Amendment." *Id.* at 446, 116 S.Ct. 994, 997-98. This Court affirmed the Michigan Supreme Court's view that the forfeiture at issue was distinctly remedial, and not punitive; as such, the innocence of the owner does not implicate due process rights. *Id.*, 516 U.S. at 451-2, 116 S.Ct. 994, 1000.

In rejecting the innocent owner defense in *Bennis*, this Court appears to have overruled, or at least seriously called into question, its holding in *Austin*. In his dissent, Justice Stevens wrote:

> The Court's holding today is dramatically at odds with our holding in *Austin v. United States*. We there established that when a forfeiture constitutes 'payment to a sovereign as punishment for some offense' – as it undeniably does in this case – it is subject to the limitations of the Eighth Amendment's excessive fines clause").

Bennis, 516 U.S. at 471, 116 S.Ct. 994, 1010 (Stevens, J. dissenting).

It is difficult to square the notion of an innocent owner losing a car to the State, while at the same time upholding the premise of Eighth Amendment excessiveness review. The Eighth Amendment protects individuals from the imposition of excessive fines, however they may be characterized. The forfeiture at issue in this case was levied, at least in part, as punishment: a fine. As such, it must be scrutinized under the rubric of the Eighth Amendment. *Id.* It is clear, as the dissent in *Bennis* expressly recognized, that there must be limits to the Government's power, despite the long history of caselaw attacking guilty property outside Eighth Amendment scrutiny.

Finally, in 1998, in *Bajakajian, supra*, this Court attempted to bring both punitive *in rem* and *in personam* forfeitures under the umbrella of the Eighth Amendment, in effect returning to the jurisprudence of *Austin*. *Bajakajian*, 524 U.S. at 333-4, 118 S.Ct. 2028, 2036. The case involved an appeal of the Ninth Circuit's decision that forfeiture of $357,144 for violation of a reporting requirement under 31 U.S.C. § 5316(a)(1)(A), was excessive under the Excessive

Fines Clause. *Id.* The Court concluded that the forfeiture was punitive in nature, and as such had to be analyzed under a two-part test, involving both instrumentality and proportionality determinations. *Id.* at 333-4, 118 S.Ct. 2028, 2036. This Court ruled that whether a forfeiture is *in rem* or *in personam*, a gross proportionality test must be employed to determine whether it is unconstitutionally excessive:

> In this case, however, the Government has sought to punish respondent by proceeding against him criminally, *in personam*, rather than proceeding *in rem* against the currency. It is therefore irrelevant whether respondent's currency is an instrumentality; the forfeiture is punitive, and the test for the excessiveness of a punitive forfeiture involves solely a proportional determination.

Id. The Court dismissed the Government's contentions that only the instrumentality test should be applied, and held that forfeitures, because of their punitive nature, are distinct from traditional notions of "guilty property," and thus are subject to Eighth Amendment gross proportionality review.

In so holding, however, the Court neglected to recognize a critical distinction between punitive *in rem* and *in personam* actions. This distinction, which is at the heart of the instant case, is that punitive *in rem* claimants have not been afforded the same constitutional rights in respect to determinations of guilt as *in personam* defendants. If they may be deprived of their property, and subjected to the same analysis that applies to individuals who have been found guilty after the processes and safeguards built into the criminal justice system, innocent owners of property taken by *in rem* proceedings will have been denied their right to due process of law.

Though the Court may not have explicitly stated that punitive *in rem* and *in personam* forfeitures should be treated

similarly, the implication is clear. Other courts, claiming to be following *Austin*, have treated the two types of proceeding as one and the same for the purpose of constitutional review. *See, e.g., U.S. v. 6380 Little Canyon Road*, 59 F.3d 974, 983 (9th Cir. 1995) (holding that *in rem* and *in personam* forfeitures should be examined under the same two-prong [instrumentality and proportionality] test, "the instrumentality test rests on a sharp distinction between *in personam* (criminal) and *in rem* (civil) forfeiture, the importance of which was reduced by the Court's decision in *Austin*"); *see also U.S. v. Milbrand*, 58 F.3d 841, 847 (2nd Cir. 1995) ("[t]hus, we join those courts that have concluded that appropriate excessiveness analysis entails a multi-factor test combining the principles of both instrumentality and proportionality").

B. The Fourth Circuit's adoption (and subsequent repudiation) of the "instrumentality" test illustrates the confusion surrounding the appropriate standard to be applied to punitive *in rem* forfeitures.

In considering punitive *in rem* forfeitures in *U.S. v. Chandler*, the Fourth Circuit first adopted the "instrumentality" test articulated by Justice Scalia in *Austin*.[10] *U.S. v. Chandler*, 36 F. 3d 358, 363 (4th Cir. 1994) ("[t]hese cases seem to recognize two approaches to an excessiveness inquiry, one utilizing the instrumentality

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[10] *Chandler* was an *in rem* forfeiture action seeking a 33-acre farm that had allegedly been involved in drug trafficking. *U.S. v. Chandler*, 36 F. 3d 358 (4th Cir. 1994). The Fourth Circuit affirmed the forfeiture of the property by applying an instrumentality test. 36 F.3d at 366 ("[i]n short, the overwhelming evidence presented by the Government showed that Little River farm was both a substantial and meaningful instrumentality of the alleged drug offense. We have no difficulty in concluding that the forfeiture of the 33-acre property known as Little Farms was legal under 21 U.S.C. §§ 881(a)(6) & (a)(7) and did not violate the Excessive Fines Clause of the Eighth Amendment.").

principle proposed by Justice Scalia in *Austin*, and the other adopting the traditional Eighth Amendment proportionality principle articulated in *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001 (1983).") Adopting the instrumentality standard, the *Chandler* court laid out factors that must be considered in rendering a judgment. These include: "(1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can be readily separated from the remainder." 36 F.3d at 365.

The *Austin* majority declined to proffer a rule for the determination of whether *in rem* forfeitures are excessive, leaving the responsibility for doing so to the lower courts. In response, different courts have formulated different tests. *See, e.g., Milbrand*, 58 F.3d at 847 (holding that a multi-factor proportional and instrumentality test is appropriate); *6380 Little Canyon Road*, 59 F.3d at 983 (holding that a two-part proportionality and instrumentality test is appropriate). Notably, the Ninth Circuit has adopted a two-pronged approach, incorporating both an instrumentality and a proportionality analysis. *U.S. v. Bajakajian*, 84 F.3d 334, 336 (9th Cir. 1996) ("[w]e recently addressed this issue and established a two-pronged test for determining whether a forfeiture is unconstitutional under the Eighth Amendment."). This Court affirmed the Ninth Circuit's decision, *U.S. v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028 (1998), but changed the test with respect not only to the *in personam* determination but also to the determination of Eighth Amendment excessiveness in a punitive *in rem* context as well. *Bajakajian*, 524 U.S. at 333-4, 118 S.Ct. 2028, 2036 ("[u]ntil today, however, we have not articulated a standard for determining whether a punitive forfeiture is constitutionally excessive. We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense.").

The Fourth Circuit, guided by its reading of *Austin*, and strict adherence to Justice Scalia's concurrence in that case, adopted an instrumentality test. In doing so, that court attempted to translate traditional notions of *in rem* actions attacking "guilty property," rather than a guilty owner, to a test for excessiveness:

> The factfinder's task in a forfeiture proceeding is to determine whether the subject property was "substantially connected" to illegal activity. ... This question too parallels the Eighth Amendment instrumentality inquiry. The statutory "innocent owner" defense in [21 U.S.C.] § 881(a)(7) likewise goes far toward assuaging Eighth Amendment concerns: an owner had the opportunity to refute the Government's prima facie showing of probable cause by asserting his lack of culpability.

Chandler, 36 F.3d at 368-369 (Wilkinson, C. J., concurring) (citation omitted). In so ruling, the Fourth Circuit overlooked the central premise of *Austin*: *in rem* actions are punitive in nature, rather than merely remedial. Because they are punitive, these actions are conceptually different from the traditional forfeitures of which the majorities in *Bajakajian* and *Austin* spoke. Justice Scalia's concurrence in *Austin* treated *in rem* forfeitures as though they were much closer to the traditional concept of guilty property; thus, it is not surprising that the Fourth Circuit in *Chandler* adopted his view and applied an instrumentality test to the punitive *in rem* action under consideration.

Other courts have acknowledged that the instrumentality test must be tempered, because of the punitive nature of *in rem* actions. *See, e.g., Little Canyon Road, supra*, 59 F.3d at 983 ("[a]lthough any forfeiture must

meet the instrumentality test, its potentially harsh results, when applied alone, make us hesitate to accept it as the sole test for applying the command of *Austin*. We accept the proportionality test as a check on the instrumentality approach.")

C. The Fourth Circuit's application of the *in personam* forfeiture test to the instant punitive *in rem* action violated Ahmad's constitutional right to due process of law under the Fifth Amendment.

In the case now before the Court, the Fourth Circuit repudiated its position in *Chandler*, and applied the *in personam* test elucidated in *Bajakajian* to a punitive *in rem* action. In so doing, the Circuit correctly concluded that the *in rem* forfeiture at issue constituted punishment, at least in part: the holding was premised upon this Court's opinion in *Austin*, 509 U.S. at 618, 113 S.Ct. 2801, 2810 ("[w]e conclude, therefore, that forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment."). Based on this determination, the court of appeals concluded that regardless of whether forfeitures are punitive *in rem* or *in personam*, they should be subject to the same gross proportionality test for assessing their excessiveness.

The Fourth Circuit's analysis of *Bajakajian* thus abandoned this Court's long standing position that *in rem* forfeitures differ from *in personam* ones. *U.S. v. Ahmad,* 213 F.3d 805, 814 (4th Cir. 2000) ("[t]hus, not only did the *Bajakajian* Court recognize as the well-established rule that true civil *in rem* instrumentality forfeitures are exempt from the excessive fines analysis, but it also did nothing to change or limit this rule."). The Fourth Circuit also acknowledged that *in rem* forfeiture actions may permissibly constitute punishment in appropriate situations. *Id.*, at 811-812. This

shift in analysis can be seen most visibly in *Austin* and *Bajakajian*.

However, once it is accepted that *in rem* actions may constitute punishment, and the same test is applied for *in rem* forfeitures as to *in personam* ones, it is incumbent upon this Court to take the next logical step, and hold that *in rem* claimants must be afforded appropriate constitutional safeguards. *See* Section D, *infra*.

D. By applying the *in personam* test of *Bajakajian* to a punitive *in rem* proceeding, the Fourth Circuit blurred the distinction between civil and criminal actions, and thereby impermissibly deprived Ahmad of the safeguards to which he would be entitled in a traditional criminal proceeding.

As this Court has previously held, an action for civil forfeiture is very much like a criminal proceeding. *See, e.g., United States v. United States Coin and Currency*, 401 U.S. 715, 718, 91 S. Ct. 1041, 1043 (1971) ("But as *Boyd v. United States*, 116 U.S. 616, 634, 68 S.Ct. 524, 29 L.Ed. 746 (1886), makes clear, 'proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal'"). In *United States v. $814,254.76 in U.S. Currency*, 51 F.3d 207 (9th Cir. 1995), the Ninth Circuit wrote:

> [18 U.S.C.] § 984 extends liability to new defendant property, just as if it had extended liability to particular individuals whose behavior had previously been innocent. That is, § 984 expands the universe of potential defendants rather than merely expanding the procedural mechanisms available for

> executing judgments against defendants already liable under the prior statute.

51 F.3d at 211; *see also One 1958 Plymouth Sedan v. Commonwealth*, 380 U.S. 693, 700, 85 S.Ct. 1246, 1250 (1965) ("a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law.").

Applying the "gross proportionality" test to uphold a forfeiture, as the Fourth Circuit did in this case, further blurs the distinction between civil and criminal, and essentially allows the Government **to impose a punitive fine on Ahmad for a crime of which he was actually acquitted**.

In so holding, however, the Fourth Circuit created a situation in which Ahmad is deprived of even the fundamental protections, both constitutional and statutory, that are accorded to criminal defendants, as is set forth more fully below.

1. Double Jeopardy. The Fifth Amendment guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." This Court has routinely insisted that the Double Jeopardy Clause applies to **all** criminal proceedings, and guarantees that an individual is not made to stand trial twice for the same offense. *See, e.g., Witte v. United States,* 515 U.S. 389, 396, 115 S.Ct. 2199, 2204 (1995) ("[s]ignificantly, the language of the Double Jeopardy Clause protects against more than the actual imposition of two punishments for the same offense; by its terms it protects a criminal defendant from being twice put in jeopardy for such punishment.")

This prohibition, however, has been held not to apply to civil forfeiture proceedings. *United States v. Ursery*, 518 U.S. 267, 270-71, 116 S.Ct. 2135, 2138 (1996) ("civil forfeitures (and civil forfeitures generally), we hold, do not constitute 'punishment' for purposes of the Double Jeopardy

Clause."). Here, although Ahmad was **acquitted** of structuring, and could not be retried on that count, his property was nonetheless forfeited for the offense of which he was found not guilty. A distinction between the forfeiture of his assets and a fine after a criminal conviction is a distinction without a difference. In other words, where a criminal defendant would have had the benefit of the prohibition against double jeopardy, Ahmad did not.

2. Burden of proof. It hardly bears pointing out that a fundamental tenet of American jurisprudence is that the Government must prove the guilt of a criminal defendant beyond a reasonable doubt. *See, e.g., United States v. Gaudin,* 515 U.S. 506, 510, 115 S.Ct. 2310, 2313 (1995) ("[w]e have held that these provisions require criminal prosecutions to rest upon a jury determination that the defendant is guilty of every element of every element of the crime with which he is charged, beyond a reasonable doubt."). Failing such proof, of course, the defendant must be determined to be innocent.

By contrast, in an action for civil forfeiture, the Government bears the initial burden of going forward. Once it has shown that there is probable cause to support the forfeiture, however, the burden shifts to the property owner to prove that his property is not liable under the forfeiture statute. *See, e.g., United States v. Ursery,* 518 U.S. 267, 289 116 S.Ct. 2135, 2147-48 (1996). Ultimately, the case is resolved on the basis of a preponderance of the evidence.

In *United States v. $129,727.00 U.S. Currency,* 129 F.3d 486 (9th Cir. 1997), the Ninth Circuit wrote:

> [W]e acknowledged that forfeiture statutes were considered "criminal" for the purpose of protecting some Fourth and Fifth Amendment rights ... However, we declared 21 U.S.C. § 881 and 19 U.S.C. § 1615 were "not

> criminal enough to prevent Congress from imposing the burden of proof on the claimant" and did not violate the claimant's due process rights. ...
>
> Nor does this circuit stand alone in holding the shifting burden of proof does not violate due process. Every circuit court that has directly addressed the issue has found no due process violation. *See United States v. One Beechcraft King Air 300 Aircraft*, 107 F.3d 827, 829-30 (11th Cir. 1997) (per curiam) (upholding shifting burden in forfeiture of aircraft); *United States v. $94,000.000 in U.S. Currency*, 2 F.3d 778, 782-84 (7th Cir. 1993) (upholding shifting burden in forfeiture based on currency reporting violations); *United States v. 228 Acres of Land*, 916 F.2d 808, 814 (2nd Cir. 1990) (upholding burden applied to forfeiture of drug-related real property); *United States v. Santoro*, 866 F.2d 1538, 1543-44 (4th Cir. 1989) (same); [*United States v.*] *$250,000.00 in U.S. Currency*, 808 F.2d [895,] at 900 [(1st Cir. 1987)] (upholding burden applied to forfeiture of drug-related currency); *Bramble v. Richardson*, 498 F.2d 968, 970-73 (10th Cir. 1974) (upholding burden applied to forfeiture of drug-related vehicle).

129 F.3d at 492-93.

By its decision below, the Fourth Circuit has abrogated the right of the innocent individual to have the Government prove his guilt beyond a reasonable doubt before he can be punished. Not only does this seem "unfair," as Justice Thomas noted in the concurrence in *Bennis*, but it

unquestionably violates at least the spirit of the Fifth Amendment. *Bennis*, 516 U.S. at 454, 116 S.Ct. 994, 1001.

Congress also recognized the inherent unfairness of this scheme when it enacted the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified as 18 U.S.C. § 983) ("[i]n a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property ... the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture"). 18 U.S.C. § 983(c). Speaking in support of the bill that became the Civil Asset Forfeiture Reform Act of 2000, Senator Leahy stated:

> Under current law, the property owner – not the Government – bears the burden of proof. All the Government must do is make an initial showing of probable cause that the property is "guilty" and subject to forfeiture. The property owner must then prove a negative – that the property was not involved in any wrongdoing. It is time to bring this law in line with our modern principles of due process and fair play, and reform forfeiture procedures to ensure that innocent property owners are adequately protected.

146 CONG. REC. S1760 (daily ed. March 27, 2000) (statement of Sen. Leahy).[11]

Although the end result of a civil forfeiture can be the same as the result following a criminal conviction – the surrendering of the defendant's assets to the Government – the civil litigant bears responsibility for showing

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[11] The Civil Asset Forfeiture Reform Act of 2000 does not apply to the case now before the Court, having an effective date of August 23, 2000. Pub. L. 106-185, sec. 21.

affirmatively why he should be entitled to keep those assets, whereas the accused criminal can rest in the knowledge that it is the Government which must prove its case, beyond a reasonable doubt. If the Government fails to do so, the assets of the acquitted defendant remain safe. The defendant has no burden of proof to carry. By contrast, in the absence of sufficient proof by the property owner in a civil forfeiture case, his assets will be forfeited. Thus, the statutory allocation of the burden of proof accords greater protection to a criminal defendant than that enjoyed by the property owner in a civil forfeiture case, regardless of whether he or she was ever convicted of a crime.

Application of the instant punitive *in rem* action against Ahmad in the case at Bar is all the more troubling, when one considers that the Government first attempted to seize his property under a criminal statute, but was unable to meet its burden of proof. Because it could not carry its burden of proof in the criminal case, the Government decided to seek forfeiture instead, thereby exacting a *de facto* fine, and accomplishing through civil forfeiture what it could not do by a conventional criminal prosecution in which Ahmad was afforded his proper constitutional safeguards.

3. Speedy trial. Although a criminal defendant is constitutionally and statutorily entitled to a speedy trial, a private litigant in a civil forfeiture does not have the same right.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." The constitutional right to a speedy trial is further enhanced by the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, which provides that in most circumstances, in a criminal matter in which the defendant enters a plea of "not guilty," trial must commence within seventy days of the date of indictment or information or from the date the defendant first appears before a judge, whichever occurs last. 18

U.S.C. § 3161(c)(1). Therefore, in an ordinary criminal case, regardless of whether the potential punishment involves incarceration or a fine, the Government must be prepared to present its case within 70 days of formal inception.

But since forfeiture proceedings are civil in nature, the Speedy Trial Act does not apply. There is **no** guidance (other than perhaps that found in the local rules of the cognizant district court) establishing a firm time schedule for the conduct of proceedings, and the statute of limitations for an action for civil forfeitures is one year. 18 U.S.C. § 984(c). Here again, the civil litigant is at a distinct disadvantage when compared to his criminal counterpart, notwithstanding the fact that the end result of the proceedings against him, the forfeiture of his assets to the Government, may well be the same.

4. Factors influencing the size of fines. As noted above, there is no practical difference between a fine imposed after a defendant is found guilty of a criminal offense, and the taking of property by the Government under a statutory civil forfeiture scheme. Where a property owner unsuccessfully defends against a civil forfeiture, however, the *res* is forfeited in the amount sought by the Government. The criminal code, by contrast, accords far more sensitivity to the personal circumstances of a criminal convict. The law sets out general considerations to be taken into account when a fine is imposed, such as these: "the nature and circumstances of the offense and the history and characteristics of the defendant; ... the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a). In addition to the factors set forth in § 3553(a), 18 U.S.C. § 3572 requires the trial court to consider, among other things:

> (1) the defendant's income, earning capacity, and financial resources;

> (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;
>
> (3) any pecuniary loss inflicted upon others as a result of the offense;
>
> (4) whether restitution is ordered or made and the amount of such restitution; [and]
>
> (5) the need to deprive the defendant of illegally obtained gains from the offense.

18 U.S.C. § 3572(a).

The disparity of treatment between civil and criminal litigants in this instance is unfair and indefensible, particularly where, as here, the Government has not established that it suffered any loss whatsoever as a result of any wrongdoing on the part of Ahmad, or any misconduct involving his property.

5. Privilege against self-incrimination. A final difference between criminal proceedings and actions for civil forfeiture lies in their approach to the privilege against self-incrimination contained in the Fifth Amendment: "No person shall be ... compelled in any criminal case to be a witness against himself." U.S. CONST. AMEND. V. Although a criminal defendant has a right to assert this privilege, and to be free from any adverse inference as a result of exercising it, in most jurisdictions a claimant in a civil forfeiture action does not share that right:

> However, the Fifth Amendment does not forbid adverse inferences against civil litigants, including claimants in civil forfeiture proceedings, who assert the privilege against self-incrimination. *See United States v. Two Parcels of Real Property*, 92 F.3d 1123, 1129 (11th Cir. 1996); *United States v. Certain Real Property & Premises Known as 4003-4005 5th Avenue*, 55 F.3d 78, 83 (2d Cir. 1995); *United States v. Premises Located at Route 13*, 946 F.2d 749, 756 (11th Cir. 1991); *United States v. A Single Family Residence & Real Property*, 803 F.2d 625, 629 n. 4 (11th Cir. 1986).

Arango v. United States Department of the Treasury, 115 F.3d 922, 926 (11th Cir. 1997); *see also United States v. Two Parcels of Real Property Located in Russell County, Alabama*, 92 F.3d 1123, 1129 (11th Cir. 1996) ("[t]his Court has held, however, that the trier of fact may take an adverse inference against the parties to a civil action refusing to testify on Fifth Amendment grounds"); *see also United States v. Stelmokas*, 100 F.3d 302, 311 (3rd Cir. 1997) (holding that because forfeiture is a civil proceeding, "as long as there was independent evidence to support the negative inferences beyond the invocation of the privilege against self-incrimination, the inferences could be drawn.").

Once again, it is clear that, if the Fourth Circuit is right, the law of civil forfeitures accords significantly greater protections to a criminal defendant than to an individual like Ahmad, who was **acquitted** of criminal offenses, but who still faces potential civil forfeiture of his assets.

E. Because of the Government's direct financial interest in the outcome of forfeiture cases, this Court must be especially vigilant in its consideration of the rights of civil litigants.

This Court has previously recognized that the danger of abuse inherent in the civil forfeiture program is greatest where, as here, "the Government has a direct pecuniary interest in the outcome of the proceeding." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56, 114 S.Ct. 492, 502 (1993). In *United States v. Funds Held in the Name or for the Benefit of Wetterer*, 210 F.3d 96, 110 (2nd Cir. 2000), the Second Circuit wrote:

> Another source of potential abuse is that forfeited funds are kept by the Department of Justice as a supplement to its budget. *See* 18 U.S.C. § 981(e); 28 U.S.C. § 524(c). Thus the agency that conceives the jurisdiction and ground for seizures, and executes them, also absorbs their proceeds. This arrangement creates incentives that evidently require a more-than-human judgment and restraint. The Supreme Court has politely remarked on the Department of Justice's "direct pecuniary interest" in maximizing drug forfeitures to meet the Department's budget target. *See United States v. James Daniel Good Real Property*, [*supra*,] (quoting 1990 memo of the Attorney General: "We must significantly increase production to reach our budget target. ... Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture

> income during the remaining three months of [fiscal year] 1990.").
>
> The bare financial facts of this case shine a light on the corrupting incentives of this arrangement: we see aggressive but marginal claims asserted on dubious jurisdiction to seize charitable funds raised for the relief of abject orphans in an impoverished country, so that the money can be diverted for expenditure by the Department of Justice.

210 F.3d at 110. Ahmad's assets in the case at Bar were not "charitable funds raised for the relief of abject orphans in an impoverished country," *id.* Nonetheless, as both this Court and the Second Circuit have pointed out, the fact that the Government stands to benefit from their forfeiture requires special attention to the manner in which that forfeiture is accomplished.

"We continue to be enormously troubled by the Government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes." *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2nd Cir. 1992). In light of the foregoing, Ahmad respectfully submits that the current jurisprudence of civil forfeitures creates a class of litigants who face the same ultimate penalties as criminal defendants, but who do not enjoy the benefit of constitutional and statutory guarantees that protect ordinary criminal defendants from overzealous prosecution. Unfortunately, it is well recognized that parties to civil forfeiture proceedings instead face precisely the sorts of abuse that these safeguards were designed to keep at bay.

If the decision of the Fourth Circuit is permitted to stand, this anomaly will be buttressed, and the Government will have been given a method of punishing citizens without

regard to the constitutional bulwarks that have protected us all since the enactment of the Bill of Rights.

CONCLUSION

For all of the foregoing reasons, Petitioner Shakeel Ahmad respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit, and that the opinion of that court be reviewed and reversed.

Respectfully submitted

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Dated: October 18, 2000

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action No. 96-1633-A

United States of America,

Plaintiff,

v.

$167,558.86 in United States Currency Seized from First Virginia Bank Account No. 90690044, $3,718.02 in United States Currency Seized from First Virginia Bank Account No. 93905491, $711.64 in United States Currency Seized from First Virginia Bank Account No. 90690095, $8,296.90 in United States Currency Seized on October 25, 1993, from the Persons of Shakeel Ahmad and Zamir Ahmed, $5,000 Posted in 1993 with the Internal Revenue Service as a Cost Bond with Respect to Administrative Forfeiture Proceedings Against the Monies Seized from Certain First Virginia Bank Account, $1,302 Posted in 1993 with the Customs Service as a Cost Bond with Respect to Administrative Forfeiture Proceedings Against Monies Seized from Shakeel and Zamir Ahmad and Shakeel Ahmad, Zamir Ahmed, and Mian Ahmed,

Defendants.

Shakeel Ahmad,
Third Party Plaintiff,

v.

First Virginia Bank,
Third Party Defendant.

MEMORANDUM OPINION

This matter came before the Court on Defendants' and Plaintiff's Motions for Judgment Based Upon Stipulated Facts. On October 22, 1993, the government obtained a criminal complaint against defendant Shakeel Ahmad, charging him with violation of the structuring laws under 31 U.S.C. § 5313(a). On October 25, 1993, Ahmad and other alleged co-conspirators were arrested. At that time, the government conducted a lawful search of Defendant's residence and seized cash, documents, and office equipment. Five days later, the government seized a total of $171,988.52 which was being held in three bank accounts at First Virginia Bank under the control of Ahmad. These funds belonged to Pakistani nationals living in the United States who regularly transferred money back to their families in Pakistan through a money exchange business operated by Defendant.

At the time of the seizure, the funds had been temporarily placed in the Bank's accounts before being transferred to Pakistan. Defendant subsequently borrowed funds in Pakistan and delivered the expected sums to the families of his customers. He is now the sole claimant to the funds.

Ahmad had been engaging in the money exchange business since 1987. Federal law requires financial institutions to file a Currency Transaction Report ("CTR")

for any cash transaction exceeding $10,000. See 31 U.S.C. § 5313. On the occasions when Defendant had more than $10,000 to deposit, he would structure his deposits so as to deposit less than $10,000 and thus avoid the filing requirement. Structuring a transaction for the purpose of evading a financial institution's CTR requirement also is prohibited. See 31 U.S.C. § 5324(a). Defendant claims that it was not until he was arrested that he learned that the reports were required by the Internal Revenue Service and that it was a criminal offense to structure a particular cash transaction so as to avoid the filing of a CTR.

On December 6 and 10, 1993, Defendant, through counsel, informed the government that he claimed an interest in the seized property and posted cost bonds totaling $6,302 to secure his claim. The government decided to dismiss the criminal complaint against Defendant on January 26, 1994; however, the government did not return Ahmad's property. Over twelve months from the seizure, the government returned an indictment charging defendant with a variety of offenses, including conspiracy (18 U.S.C. § 371), structuring (18 U.S.C. § 5322), money laundering (18 U.S.C. § 1956), false statements to the Federal Deposit Insurance Corporation.("FDIC") (18 U.S.C. § 1001), and false statements to Customs (18 U.S.C. § 542).

On January 23, 1995, the Court dismissed the money laundering charges and Defendant was found guilty of the remaining charges. Judge Bryan entered an Order of Forfeiture based exclusively upon the structuring violations, divesting Defendant of his right to the seized property pursuant to 18 U.S.C. § 982. On September 26, 1996, the United States Court of Appeals for the Fourth Circuit issued an opinion reversing Defendant's convictions for structuring and for making false statements to the FDIC and affirming Defendant's conviction for conspiracy and substantive violations of 18 U.S.C. § 542. The Fourth Circuit also

reversed the criminal forfeiture because it was based exclusively on the structuring convictions.

On November 5, 1996, Defendant filed a motion for return of seized property pursuant to FED. R. CRIM. P. 41(e). On November 12, 1996, the government filed a motion for civil forfeiture. On November 22, 1996, Defendant's Rule 41(e) motion was denied.

The government's Complaint contains three counts. In Count I, the United States alleges that the defendant currency form the First Virginia accounts constitutes property involved in a transaction or attempted transaction conducted in violation of 31 U.S.C. § 5324(a) (structuring transactions to evade reporting requirement), or constitutes property traceable to such property. In Count II, the government claims that the defendant currency constitutes only a small portion of the value of the merchandise introduced into the United States in violation of 18 U.S.C. §§ 542 and 545 (customs fraud), and thus is forfeitable under 18 U.S.C. § 545. Finally, in Count III, the government argues that structured cash deposits are the property of the United States from the moment that they are structured. Therefore, Ahmad is liable to the government in conversion and detinue for the property of the United States that he possessed in his bank accounts.

In Count I, the government seeks to forfeit $171,988.52 as property involved in a transaction in violation of 31 U.S.C. § 5324(a) or any property traceable to such property. In its motion for summary judgment, the government seeks to avoid the requirement of tracing these funds to a specific violation of section 5324(a) as required by 18 U.S.C. § 981(a)(1)(A) (civil forfeiture) by proceeding instead under 18 U.S.C. § 984 (civil forfeiture of fungible property). The government contends that this latter statute allows civil forfeiture of the defendant funds here, because

they constitute fungible property found in the same place as "guilty" property. However, the government's motion for summary judgment on Count I must fail because, pursuant to the statutes relevant to structuring as they were configured at the time of the conduct (1993), to effect a forfeiture under section 984, the government is required to prove an offense under 31 U.S.C. § 5322, not a violation of 31 U.S.C. § 5324. The government has failed to make such a showing.

The transactions at issue in this case are governed by the Supreme Court holding in Ratzlaf v. United States, 510 U.S. 135 (1994). After Ratzlaf, in 1994, Congress amended the laws relating to structuring, including amendments to section 984. Those amendments have no effect here. To constitute a violation of 31 U.S.C. § 5322 under Ratzlaf, the government was required to prove that Ahmad knew that acting to evade the applicable reporting requirements was a criminal offense.

The government argues that a footnote in Ratzlaf sets forth that the government can forfeit property involved in structured transactions even in the absence of proof that the actor knew his structuring violated criminal laws. See Ratzlaf, 510 U.S. 146 n.16. However, the footnote exception specifically applies only to civil forfeitures under 18 U.S.C. § 981 – which does not permit the forfeiture of substitute assets – for violations of 31 U.S.C. § 5324. Because 18 U.S.C. § 984 only permitted forfeiture for violations of 31 U.S.C. § 5322, the Ratzlaf footnote is not applicable to such claims. Nothing in Ratzlaf suggests that the willfulness requirement it read into section 5322 is present only for criminal purposes. But the government cannot forfeit assets for a violation of 31 U.S.C. § 5324 under 18 U.S.C. § 984 – at least it could not do so as section 984 was configured at the time of the events in this case. In 1993, the government had to show willfulness in the criminal proceeding and has presented no such evidence now.

Additionally, the government is not entitled to summary judgment on Count II, because it has failed to establish that the seized property is forfeitable under 18 U.S.C. § 545. Defendant Ahmad and the other defendants in the criminal trial were never charged with nor convicted of violating section 545. The defendants were convicted of violating section 542, a less serious offense. The government now argues that the section 542 violations establish probable cause that section 545 violations occurred. However, the government has not established that Ahmad intended to defraud the United States of revenue.

An intent to defraud the United States under section 545 requires an intent to deprive the United States of *revenue*. See United States v. Menon, 24 F.3d 550, 554 (3d Cir. 1994). The Third Circuit carefully examined the legislative history of section 545 and concluded that the statute required the government to prove that the person who passed any false invoice through customs did so with the intent to "deprive the government of revenue." See id. at 555, n.4.

In the instant case, the merchandise imported by Ahmad from Pakistan was not subject to duty. The government has admitted that the "inflated" value on the forms submitted by Falcon's brokers deprived the government not of revenue, but of accurate information which it keeps for statistical purposes.

In order to satisfy the statutory requirement, the government argues that the "intent to defraud the government of revenue" element is established by the income tax violation for which Mohammed Ismail of Falcon was convicted. This argument fails. These tax violations were independent actions on Ismail's part when he withheld information from his accountant preparing federal corporate income tax returns for Falcon long after the merchandise at

issue had been introduced into the United States. Section 545 permits forfeiture of merchandise, or the value thereof, introduced in violation of section 545 only from individuals who have "knowingly and willfully, with the intent to defraud the United States" of revenue, passed false or fraudulent invoices through a customhouse. Because the government cannot establish that any individual involved in the importation of the surgical equipment from Pakistan who was also connected with the funds the government seeks to forfeit took any action with the intent to deprive the United States of *revenue*, the government's motion for summary judgment as to Count II also must be denied.

Finally, forfeiture of defendant funds is inappropriate. Because, the funds are not the instrumentality, of any offense, forfeiture of such would violate the Eighth Amendment's prohibition against excessive fines. See Austin v. United States, 509 U.S. 602 (1983).

In United States v. Bajakajian, 84 F.3d 334 (9th Cir. 1996), the Ninth Circuit held that a forfeiture based upon a violation of the currency reporting laws violated the Eighth Amendment, because the seized property was not an "instrumentality" of the offense. In Bajakajian, the defendant was arrested at the Los Angeles Airport after it was discovered that he was carrying $357,411 in currency. When asked if he was leaving the country with less than $10,000 in currency, the defendant told customs inspectors that he was carrying only $8,000 in currency and that his wife had $7,000 in cash. The defendant entered a guilty plea to one count of failure to report currency, and the government sought to forfeit the entire $357,411 in currency pursuant to 18 U.S.C. § 982(a)(1). The Ninth Circuit rejected the government's contention that the $357,144 constituted an "instrumentality" of 31 U.S.C. § 5316. The district court in Bajakajian held that forfeiture of the entire

amount was unconstitutional and ordered the defendant to forfeit only $15,000. The Ninth Circuit upheld the trial court's judgment based upon the application of an "instrumentality" test. "Forfeiture of currency is unconstitutional when the crime to which the forfeiture is tied is a mere failure to report pursuant to 31 U.S.C. § 5316. In such situations, there simply is not an instrumentality relationship between the currency and the crime to satisfy the instrumentality prong of the Excessive Fines test." See id. at 337-38. When an individual violates the currency reporting laws, that individual deprives the government only of information, whereas the smuggling of goods into the country deprives the government of revenue. See id. at 337 (citing United States v. $69,292 in United States Currency, 62 F.3d 1161, 1167 (9th Cir. 1995)).

The Fourth Circuit also has held that an "instrumentality test" is applied to determine whether a specific civil forfeiture is an excessive fine. See United States v. Chandler, 36 F.3d 358 (4th Cir. 1994). The court should consider: "(1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can be readily separated from the remainder." Id. at 365.

In Counts I and III, the government seeks to forfeit currency which was seized in relation to alleged violations of the currency reporting laws. While there may have been a violation of section 5324, there has been no offense. As discussed above, in 1993, in order to have an offense, there must have existed a violation of section 5322. See 31 U.S.C. §§ 5322, 5324. There being no offense, there can be no nexus between the property and the offense. Also, the owner was not culpable of any crime and there was no offending property. The government's Counts I and III must be denied.

In Count II, the government seeks forfeiture based upon Defendant's conviction for violation of section 542 and upon the government's allegation that he therefore also must have violated section 545, even though he was not convicted of any such violation. The section 542 violations relate to Falcon's submission of false forms to the Customs Service, which caused the government to be deprived, not of revenue, but only of information. Thus Count II also must be denied pursuant to the instrumentality analysis in Bajakajian, because forfeiture of currency is unconstitutional when the crime to which the forfeiture is tied is a mere failure to report. Because the government's seizure of defendant property cannot withstand the Fourth Circuit's "instrumentality test," the defendants' motion for judgment on the facts is granted and the government's motion is denied.

An appropriate order shall issue.

UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
January __, 1998

APPENDIX B

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-1467

United States of America,
Plaintiff-Appellant

v.

Shakeel Ahmad,
Claimant-Appellee,

and

$167,558.86 in United States Currency Seized from First Virginia Bank Account No. 90690044, $3,718.02 in United States Currency Seized from First Virginia Bank Account No. 93905491, $711.64 in United States Currency Seized from First Virginia Bank Account No. 90690095, $8,296.90 in United States Currency Seized on October 25, 1993, from the Persons of Shakeel Ahmad and Zamir Ahmed, $5,000 Posted in 1993 with the Internal Revenue Service as a Cost Bond with Respect to Administrative Forfeiture Proceedings Against the Monies Seized from Certain First Virginia Bank Account, $1,302 Posted in 1993 with the Customs Service as a Cost Bond with Respect to Administrative Forfeiture Proceedings Against Monies Seized from Shakeel and Zamir Ahmad and Shakeel Ahmad, Zamir Ahmed, and Mian Ahmed,

Defendants,

v.

First Virginia Bank,

Third-Party Defendants.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, Chief District Judge.
(CA-96-1633-A)

Argued: February 28, 2000

Decided: May 25, 2000

Before NIEMEYER, WILLIAMS, and MOTZ,
Circuit Judges.

Reversed by published opinion. Judge Motz wrote the opinion, in Which Judge Niemeyer and Judge Williams joined.

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1 COUNSEL

ARGUED: Gordon Dean Kromberg, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellant. Michael Stefan Nachmanoff, COHEN, GETTINGS & DUNHAM, P.C., Arlington, Virginia, for Appellee. **ON BRIEF:** Helen F. Fahey, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellant. Frank W. Dunham, Jr., COHEN, GETTINGS & DUNHAM, P.C., Arlington, Virginia, for Appellee.

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2 OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

In this in rem civil action the government appeals an order denying forfeiture of the defendant funds. The government contends that some of the funds were used to structure financial transactions in violation of 31 U.S.C. § 5324 (1994), and that the remainder constitutes a substitute for property involved in customs fraud in violation of 18 U.S.C. § 545 (1994). The district court ruled that neither statute provided a basis for forfeiture of the defendant funds and that, in any event, the forfeiture would be a constitutionally excessive fine. We reverse.

I.

This civil action follows certain related criminal proceedings, which derived from a complex operation involving transfers of currency to individuals in Pakistan and the importation of surgical equipment from Pakistani manufacturers. We set forth the details of this operation in *United States v. Ismail*, 97 F.3d 50, 52-54 (4th Cir. 1996). We restate only the most relevant facts here.

Shakeel Ahmad operated a money exchange business that primarily served Pakistanis living in the United States who wanted to transfer funds back to their families in Pakistan. Ahmad deposited the funds into checking accounts held at First Virginia Bank. Following a conversation with a bank officer on September 25, 1989, Ahmad structured all of his cash deposits in amounts less than $10,000 in order to avoid the filing of currency transaction reports. From January 1, 1990 to October 25, 1993, Ahmad deposited $5.6 million in cash, cashier's checks, and wire transfers into his First Virginia Bank accounts.

In order to obtain a better exchange rate under Pakistani trade regulations, Ahmad used the funds he received from his Pakistani clients to supply bridge loans to various Pakistani companies. The companies would repay

the bridge loans by distributing rupees to the family members of Ahmad's clients. This method also allowed Ahmad to "bundle" numerous transfers into one transaction and thereby avoid multiple transaction fees. Ahmad's business dealings included many different companies, but he was charged with making false statements to the United States Customs Service only in relation to his association with Falcon Instruments.

Falcon Instruments imported surgical equipment manufactured in Pakistan for resale in the United States. During the relevant time period, the surgical instruments were non-dutiable goods. When a Pakistani manufacturer would ship the products, it would list on the invoice a significantly inflated purchase price. Upon receipt of the shipment, Falcon would request a "discount," which was generally the difference between the inflated invoice price and the price at which the manufacturer would make a small profit. Ahmad would then deposit an amount equal to the discount into Falcon's account – an account also maintained at First Virginia Bank. Falcon, in turn, would send the Pakistani manufacturer the full amount of the inflated invoice price, as required by Pakistani law, and the manufacturer would then grant the "discount" and distribute the difference between the inflated price and the "discounted" price to the family members of Ahmad's clients. Through this arrangement with Falcon, Ahmad transferred approximately $1.3 million to families in Pakistan. Falcon, for its part, caused Customs agents to list the inflated invoice price as the "transaction value" of the imported goods on Customs forms.

The government's investigation into all of these dealings ultimately resulted in the seizure and forfeiture of $186,587.42 pursuant to the criminal forfeiture statute, 18 U.S.C. § 982.

In Ahmad's criminal appeal, we affirmed his customs fraud and related conspiracy convictions under 18 U.S.C. § 542 (1994) and 18 U.S.C. § 371 (1994) respectively. However, we reversed Ahmad's convictions for structuring deposits to evade reporting requirements and for conspiracy to do so, and vacated the criminal forfeiture, because the government failed to prove that Ahmad "willfully" violated the anti-structuring statute, 31 U.S.C. § 5324(a)(3). At the time, only persons willfully violating § 5324 were subject to criminal penalties. *See 31 U.S.C.* § 5322 (1994) (amended 1994); Ismail, 97 F.2d at 56, 59.

Shortly after issuance of our mandate in Ismail, Ahmad filed a motion for return of the seized funds; days later, on November 11, 1996, the government filed this action for civil forfeiture of these funds.[1] Ahmad intervened in the action to file a claim for the property. On January 21, 1998, after the United States and Ahmad stipulated as to all relevant facts, the district court entered judgment in favor of Ahmad finding no statutory basis for the forfeiture and concluding that, in any event, the forfeiture would constitute an excessive fine. On appeal, the government contends that (1) $85,000 of the defendant currency is forfeitable because it is directly traceable to the structuring violations; (2) the

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[1] Congress has recently approved new legislation that enhances the government's burden of proof in civil forfeiture proceedings. See Civil Asset Forfeiture Reform Act of 2000, H.R. 1658, 106th Cong. § 2(c). This legislation, if signed by the President, will require the government "to establish, by a preponderance of the evidence, that the property is subject to forfeiture." *Id.; see infra* Part III. The bill also provides a "gross disproportionality" standard for determining whether a civil forfeiture is constitutionally excessive and places the burden on the claimant to "establish that the forfeiture is grossly disproportional by a preponderance of the evidence." Id. at § 2(g); *see infra* Part IV. The Act applies "to any forfeiture proceeding commenced on or after the date that is 120 days after the date of enactment," *id.* at § 21, and thus would not apply to the present action.

remaining $101,587.42 of the defendant currency is forfeitable as a substitute for property involved in customs fraud violations; and (3) civil forfeiture of the entire amount of the defendant currency does not constitute an excessive fine in violation of the Eighth Amendment.

We address each of these contentions in turn.

II.

The anti-structuring statute provides: "No person shall for the purpose of evading the reporting requirements of section 5313(a) [which requires banks to file currency transaction reports for any cash transaction exceeding $10,000] structure or assist in structuring, or attempt to structure or assist in structuring any transaction." 31 U.S.C. § 5324(a)(3); *see also* 31 C.F.R. § 103.22(b)(1) (1999). In the prior criminal action, we reversed Ahmad's convictions under 31 U.S.C. § 5322 for "willfully violating" the anti-structuring statute because the government failed to prove, as required by *Ratzlaf v. United States,* 510 U.S. 135 (1994), that Ahmad knew that structuring violated the law. *See Ismail,* 97 F.3d at 59. In 1994, Congress amended § 5322 to eliminate the willfulness requirement with respect to structuring violations under § 5324, *see* Pub. L. No. 03-325, § 411 (c)(1), 108 Stat. 2160, 2253 (1994), but at the time of the structuring involved in this case, a defendant's knowledge of the illegality of the structuring was necessary to trigger the criminal penalties in § 5322. *See Ismail,* 97 F.3d at 56, 59. However, even prior to amending § 5322, Congress had provided for civil forfeiture – "without any willfulness requirement," *see Ratzlaf,* 510 U.S. at 146 n.16 – of property "involved in a transaction ... in violation of [the anti-structuring statute]." Thus, the government could obtain the forfeiture of assets involved in a transaction that was illegally structured under § 5324 even when no individual could be held liable for the illegal transaction under § 5322.

The case at hand, of course, is a civil in rem forfeiture action. Contrary to the understanding of the district court, the government seeks, pursuant to 18 U.S.C. § 981(a) (1994), forfeiture of $85,000 of the defendant currency as property involved in a transaction violating the anti-structuring statute, 31 U.S.C. § 5324. The $85,000 meets this criterion because the parties have stipulated that this amount "is directly traceable to deposits structured so as to avoid the reporting requirements." Accordingly, as Ahmad concedes, unless this $85,000 constitutes an excessive fine, *see infra* Part IV, it is subject to forfeiture in this action.

III.

The government argues that the remaining portion of the defendant currency, $101,587.42, is forfeitable under 18 U.S.C. § 545 as substitute assets for the value of the imported surgical equipment introduced into the United States through the use of fraudulent invoices. Section 545 provides that merchandise introduced into the United States by smuggling, clandestine activity, or fraudulent invoicing, or "the value" of such merchandise "recovered from" a person engaging in such activity "shall be forfeited to the United States." 18 U.S.C. § 545. In order to effect the forfeiture, the government must demonstrate probable cause that a violation of § 545 has occurred. *See* 28 U.S.C. § 2461 (1994); *United States v. An Antique Platter of Gold,* 991 F. Supp. 222, 230 (S.D.N.Y. 1997), *aff'd,* 184 F.3d 131 (2d Cir. 1999); *United States v. One 8th Century Colombian Monstrance,* 802 F.2d 837, 838 (5th Cir. 1986). An unrebutted probable cause showing will suffice to justify the forfeiture. *See, e.g., United States v. Thomas*, 913 F.2d 1111, 1114 (4th Cir. 1990).

To satisfy its burden of demonstrating probable cause that a § 545 violation occurred, the government relies on the

asserted collateral estoppel effect of Ahmad's criminal convictions, which we have affirmed, for conspiracy to defraud the United States under 18 U.S.C. § 371 and customs fraud under 18 U.S.C. § 542 (which is violated when a person "introduces ... into the commerce of the United States any imported merchandise by means of any fraudulent or false ... statement").

Ahmad fails to offer any evidence to rebut this probable cause showing. Instead, he maintains that § 545 must be interpreted so as to require the government to prove an intent to defraud the United States of "revenues," which he admits is not a requirement of § 542. The district court relied on this interpretation to hold that the government failed to demonstrate probable cause that § 545 had been violated. The court reasoned that because the surgical equipment was not subject to duty, the customs forms overstating the value of the equipment did not deprive the government of revenues but only of accurate information.

The first paragraph of § 545 provides in relevant part that anyone who "knowingly and willfully, with intent to defraud the United States ... makes out or passes ... through the customhouse any false, forged or fraudulent invoice or other document or paper" violates federal law. 18 U.S.C. § 545. Thus, the first paragraph of the statute plainly does not require that the United States be deprived of "revenues" in order for a violation of the statute to occur.

The predecessor statutes to this portion of § 545, the Tariff Acts of 1842 and 1930 did require an intent to defraud the "revenues of the United States." *See* Act of June 17, 1930, ch. 497, 46 Stat. 751 (codified at 19 U.S.C. § 1593 (1940)), *repealed by* Act of June 25, 1948, ch. 645, 62 Stat. 862. In 1948, those predecessor statutes were recodified in § 545 and the words "the revenues of" deleted. *See* Act of June 25, 1948, ch. 645, 1948 U.S.C. Cong. Serv. (62 Stat.

716) 695, A 369-70. Until 1994, our sister circuits had uniformly given effect to the plain language of the recodified statute and held a violation of § 545 need not be based on an intent to defraud the United States of "revenues." *See, e.g., United States v. Borello,* 766 F.2d 46, 51-52 (2d Cir. 1985); *United States v. Kurfess,* 426 F.2d 1017, 1019 (7th Cir. 1970); *United States v. Boggus,* 411 F.2d 110, 113 (9th Cir. 1969).

In holding to the contrary, the district court relied on the Third Circuit's more recent decision in *United States v. Menon,* 24 F.3d 550 (3d Cir. 1994). The *Menon* court ruled that "the meaning of 'defraud' must be interpreted in the context of the particular statute that uses the term.... [A]n intent to defraud generally requires an intent to deprive someone of property or money but does not generally require such an intent in the context of statutes making it illegal to defraud *'the United States'* . . . *unless* there is countervailing evidence on the meaning of the statute." Id. at 556. The Third Circuit identified as "countervailing evidence" the legislative history of the 1948 revision of the United States Code, specifically, the House Report, which explains that Congress did not intend any substantive changes unless explicitly discussed in the Reviser's Notes. Id. at 556-57. Because the Reviser's Note to § 545 states only that "[c]hanges were made in phraseology" and fails to discuss the impact of deleting the words "the revenues of," the *Menon* court held that Congress did not intend to work a substantive change in the statute by interpreting "to defraud the United States" more broadly. *Id.*

In other words, the Third Circuit in *Menon* relied on a negative inference, based on the Reviser's Note, to construe § 545 contrary to the statute's plain language. This seems to us a perilous course, at odds with the Supreme Court's repeated admonition that statutory construction begins with examining the language of the statute, and that when the

language is clear, the judicial inquiry "in all but the most extraordinary circumstance, is finished." *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

The Supreme Court's recent decision in *United States v. Wells*, 519 U.S. 482, 497 (1997), heightens our unease with the *Menon* rationale. There the Court specifically refused to extend similar interpretive deference to the Reviser's Notes. The statute at issue in *Wells*, 18 U.S.C. § 1014 (1994), makes it a crime to knowingly make false statements to a federally insured bank. Notwithstanding language in some of § 1014's statutory predecessors establishing a falsehood's materiality as an element of the offense and the Reviser's Note that the consolidation of many prior provisions into one statute "was without change of substance," 519 U.S. at 496, the *Wells* Court refused to hold that materiality was an element of § 1014 given the lack of any such requirement in the statutory language.

The Court explained that the Reviser's Note did "nothing to muddy the ostensibly unambiguous provision of the statute as enacted by Congress.... [and] the revisers' assumption that the consolidation [of various provisions] made no substantive change was simply wrong ... Those who write revisers' notes have proven fallible before." *Id.* at 497; *see also United States v. Robinson*, 147 F.3d 851, 853 (9th Cir. 1998) (rejecting the *Menon* rationale and holding instead that § 545 "protects governmental interests extending beyond mere property rights," and thus, "the intent to defraud element ... should be construed as meaning intent to avoid and defeat the United States customs laws ... rather than the narrower construction 'intent to deprive the United States of revenue"); *United States v. Nathan*, 188 F.3d 190, 204 (3d Cir. 1999) (citing *Robinson*, rather than its own decision in *Menon*, and noting that a number of courts have

applied a broad construction to the intent to defraud element of § 545).[2]

In sum, the plain language of § 545 does not require the government to prove that it suffered a loss of revenue any more than § 542 does. Ahmad has failed to articulate any compelling reason why we should not follow the statutory language. Therefore, Ahmad's conviction for conspiracy to violate § 542 satisfies the government's burden of demonstrating probable cause that a violation of § 545 has occurred. Accordingly, § 545 entitles the government to civil forfeiture of the $101,587.42 recovered from Ahmad as a portion of "the value" of the surgical equipment introduced into this country in violation of that statute, but only if this forfeiture does not constitute an excessive fine prohibited by the Eighth Amendment.

We now turn to that analysis.

IV.

The Eighth Amendment prohibits the imposition of "excessive fines." U.S. CONST. amend. VIII. In recent years, the Supreme Court has held that this prohibition applies even

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[2] Moreover, Ahmad's reliance on *McNally v. United States*, 483 U.S. 350 (1987), to support the *Menon* interpretation of § 545 is misplaced. *McNally* narrowly construed "defraud" in the mail fraud statute, 18 U.S.C. § 1341, but the scope of that statute, unlike § 545, is not limited to frauds victimizing the United States. The *McNally* Court distinguished the mail fraud statute from another statute, 18 U.S.C. § 371 – which criminalizes conspiracies "to defraud the United States" – and cited with approval the Supreme Court's earlier rulings in *Hammerschmidt v. United States*, 265 U.S. 182 (1924), and *Hass v. Henkel*, 216 U.S. 462 (1910), both of which adopted the broader interpretation of "defraud" for "statute[s] which ha[ve] for [their] object the protection and welfare of the government alone." 483 U.S. at 358 n.8 (quoting *Cupley v. United States*, 130 F. 1, 7 (1st Cir. 1904)).

to certain in rem civil forfeitures, and has provided guidance as to when forfeitures constitute "excessive fines."

A.

In *Austin v. United States*, 509 U.S. 602, 610 (1993), the Court held that the limitations imposed by the Excessive Fines Clause of the Eighth Amendment apply to in rem civil forfeiture proceedings if the forfeiture, at least "in part," constitutes punishment. The defendant in Austin, who had sold two grams of cocaine, pled guilty to one count of possession with intent to distribute cocaine. Pursuant to 21 U.S.C. §§ 881(a)(4) and (a)(7), the government then filed an in rem civil action seeking forfeiture of his mobile home, where he stored the cocaine, and his auto body shop, where he sold the drugs; the defendant challenged the forfeiture as punitive and violative of the Eighth Amendment's Excessive Fines Clause.

In resolving this question, the *Austin* Court surveyed the historical development of forfeiture law, id at 611-18, and concluded "that forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment." *Id.* at 618. The Court then noted that the "innocent owner" defense provided in § 881 and in many other modem forfeiture statutes "makes them look more like punishment, not less," than traditional forfeiture statutes containing no such defense. *Id.* at 619.

The government nonetheless maintained that the forfeitures in *Austin* were remedial rather than punitive because they "removed the 'instruments' of the drug trade, 'thereby protecting the community from the threat of continued drug dealing.'" *Id.* at 620. The Supreme Court acknowledged that it had "recognized that the forfeiture of contraband itself may be characterized as remedial," but noted that it "previously ha[d] rejected government's attempt

to extend that reasoning to conveyances used to transport illegal liquor." Id at 621. Without further analysis of the history or character of instrumentality forfeitures, the *Austin* Court concluded that the "Government's attempt to characterize" the mobile home and auto body shop "as 'instruments' of the drug trade must meet the same fate as Pennsylvania's [unsuccessful] effort to characterize" a car used to transport illegal liquor as forfeitable "contraband." *Id.* (citing *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 699 (1965)).

Although the *Austin* Court concluded that forfeiture of the mobile home and body shop were "properly considered punishment" and so subject to the limitations of the Excessive Fines Clause of the Eighth Amendment, *id.* at 619, 622, it refused to establish any test "for determining whether a forfeiture is constitutionally 'excessive.'" *Id.* at 622. Rather it remanded the case to allow the lower courts to consider in the first instance whether the challenged forfeitures were excessive. *Id.* at 622-23.

Just two terms ago, in *United States v. Bajakajian,* 524 U.S. 321 (1998), the Supreme Court again considered these questions, and, for the first time, articulated a test for determining whether a punitive forfeiture violates the Excessive Fines Clause. *Bajakajian* involved an international traveler who, on one occasion, failed to declare that he was carrying currency in excess of $10,000 out of the United States in violation of the reporting requirements under 31 U.S.C. § 5316 (1994). The government brought criminal proceedings against the traveler under 18 U.S.C. § 982(a)(1) (1994) seeking forfeiture of the $357, 144 it had seized from him; the defendant maintained that the forfeiture was a constitutionally excessive fine.

In the course of concluding that forfeiture of $357,144 did indeed constitute an excessive fine, the

Supreme Court first revisited the punitive versus remedial distinction. It quickly concluded that the forfeiture before it – an in personam, criminal forfeiture under § 982 that "cannot be imposed upon an innocent owner of unreported currency" – constituted punishment and so triggered the excessive fines inquiry. *See Bajakajian,* 524 U.S. at 328. The Court did not, however, limit itself to analyzing the nature of criminal in personam forfeitures, which it deemed to be per se punitive. As in *Austin,* the Court discussed the nature of civil in rem forfeitures and reiterated *Austin's* holding that even if a forfeiture served some remedial purpose, it would still be subject to analysis as a possibly excessive fine if it were punitive "in part." *Id.* at 329 n.4.

But rather than following *Austin's* view that traditional civil in rem forfeitures "historically have been understood, at least in part, as punishment," 509 U.S. at 618, the *Bajakajian* Court concluded that "[t]raditional in rem forfeitures were ... not considered punishment." 520 U.S. at 331. Indeed, the Court expressly stated that "[b]ecause they were viewed as nonpunitive, such forfeitures traditionally were considered to occupy a place outside the domain of the Excessive Fines Clause." *Id.* The *Bajakajian* Court noted, however, that because "some recent federal forfeiture laws have blurred the traditional distinction between civil in rem and criminal in personam forfeiture," not "all modem civil in rem forfeitures are nonpunitive." *Id.* at 331 n.6 (emphasis added). Nonetheless, the *Bajakajian* analysis and language significantly limit *Austin's* apparent conclusion that traditional civil in rem forfeitures generally are punitive to some degree.

The *Bajakajian* Court's consideration of the government's argument that the unreported currency it sought to have forfeited was an "instrumentality" of the offense, and therefore nonpunitive, mirrors this change in approach. Rather than rejecting any instrumentality

argument out of hand, as the *Austin* Court seemingly did, the *Bajakajian* Court recognized that "[i]nstrumentalities historically have been treated as a form of 'guilty property' that can be forfeited in civil in rem proceedings." *Id.* at 333. The Court concluded, however, that the instrumentality question was "irrelevant" in the case before it because the government did not bring a civil in rem action against the currency but "sought to punish [Bajakajian] by proceeding against him criminally, in personam." *Id.* Alternatively, the Court noted that "[t]he currency in question [was] not an instrumentality in any event" because it did nothing to facilitate the offense; rather it was "merely the subject of the crime of failure to report." *Id.* at 334 n.9.

Having determined that the forfeiture of the currency was punitive, the *Bajakajian* Court turned to evaluating the excessiveness of the forfeiture. Because "judgments about the appropriate punishment for an offense belong in the first instance to the legislature" and "any judicial determination regarding the gravity of a particular offense will be inherently imprecise," the Court held that there need not be "strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense." *Id.* at 336. Rather a punitive forfeiture will be held to violate the Excessive Fines Clause only if it is "grossly disproportional" to the gravity of the offense. *Id.* at 334, 337.

In deciding whether the forfeiture before it was grossly disproportional to the offense, the *Bajakajian* Court considered the nature and extent of the criminal activity, its relation to other crimes, its penalties, and the harm it caused. First, the Court noted that the crime at issue was "solely a reporting offense," explaining that transporting currency out of the country is lawful as long as the currency is reported. *Id.* at 337. Second, the Court emphasized that this "single" reporting offense, *id.* at 337 n.12, "was unrelated to any other illegal activities" – the currency was produced by and

used for legal activities. *Id.* at 338. Third, the Court focused on the penalties for the offense. It recognized that the maximum statutory penalty (a $250,000 fine and five years imprisonment) was "certainly relevant evidence" of the offense's gravity, but determined that "the maximum sentence that could have been imposed on [Bajakajian]" under the Sentencing Guidelines (a $5,000 fine and six months imprisonment), confirm[ed] a minimal level of culpability" in Bajakajian's case. *Id.* at 33 8-39 & n. 14. Finally, the Court determined that the harm caused by the offense was also minimal:

> Failure to report his currency affected only one party, the Government, and in a relatively minor way. There was no fraud on the United States, and respondent caused no loss to the public fisc. Had his crime gone undetected, the Government would have been deprived only of the information that $357,144 had left the country.

Id. at 339. For these reasons, the Court held that the forfeiture of $357,144 for a single reporting violation, unrelated to any other illegal activity, and harming only the United States "in a relatively minor way," constituted an excessive fine in violation of the Eighth Amendment.

B.

In light of the principles enunciated in *Bajakajian* and *Austin,* we believe that forfeiture of the $85,000 of the currency traceable to the deposit structuring offenses under 31 U.S.C. § 5324 withstands constitutional scrutiny.

I.

We first consider whether this $85,000 constitutes an instrumentality of the structuring offenses; if it does, forfeiture of that amount in this civil in rem action does not trigger the excessiveness inquiry.

As previously discussed, *Bajakajian* expressly concluded that "[i]nstrumentalities historically have been treated as a form of 'guilty property' that can be forfeited in civil in rem proceedings." Id. at 333. Moreover, although the *Bajakajian* Court noted the strict historical limits on what may be considered an instrumentality (such forfeitures are confined "to the property actually used to commit an offense and no more," *id.* at 333 n.8), the Court did not repudiate the established treatment of instrumentalities as forfeitable. Thus, not only did the *Bajakajian* Court recognize as the well-established rule that true civil in rem instrumentality forfeitures are exempt from the excessive fines analysis, but it also did nothing to change or limit this rule.

Of course, in *Bajakajian,* the Court concluded that the forfeiture before it did not constitute an instrumentality forfeiture. It found the instrumentality inquiry "irrelevant" because no "guilty property" had been "forfeited in civil in rem proceedings;" rather the government had brought criminal in personam forfeiture proceedings against Bajakajian. *Id.* at 333. In the case at hand, the government has brought a civil in rem proceeding against the currency. Thus, the principal ground for rejecting the instrumentality inquiry in *Bajakajian* – irrelevance – simply does not apply here; the instrumentality inquiry is certainly relevant in this case.

Ruling in the alternative, the Court in *Bajakajian* accepted the argument that because the existence of the forfeited currency was a "precondition" to the reporting

requirement under 31 U.S.C. § 5316, it could not be an instrumentality of the offense. *Id.* at 334 n.9. Whether this rationale applies to the present case is a close question. The statute involved here, like that at issue in *Bajakajian,* implicates a reporting requirement, but it is less clear than in *Bajakajian* that the forfeited currency seized in this case constituted a precondition to the reporting requirement. The anti-structuring statute mandates that all cash transactions in excess of $10,000 be reported. *See* 31 U.S.C. § 5324(a). Thus, the "precondition" to this reporting requirement is a cash transaction in excess of $10,000. Arguably, no portion of the defendant funds traceable to the structured transactions can be deemed a "precondition" to this requirement because all such funds were broken down into deposits of less than $10,000 so as to circumvent the requirement, thus causing First Virginia Bank to fail to file the required cash transaction reports. Put another way, the unreported funds in *Bajakajian* could not constitute an "instrumentality" of the crime of failure to report – a crime of "pure omission" – because "the offense [wa]s not doing something but doing nothing." *United States v. $145,139.00 in United States Currency,* 18 F.3d 73, 80 (2d Cir. 1994) (Kearse, J., dissenting). In contrast, Ahmad's structuring was not just an "omission," but "an affirmative act of concealment," *id.*, and thus the structured funds arguably could constitute an instrumentality of that concealment.

Although there is certainly a respectable argument that the $85,000 traceable to the structuring offenses is an instrumentality forfeiture, several factors make us hesitate to so hold. First, of course, the facts here are undeniably very close to those in *Bajakajian,* where the Supreme Court held the currency did not constitute an instrumentality forfeiture. The factual similarity of the two cases acquires special significance when considered in conjunction with the *Bajakajian* Court's teaching that instrumentality forfeitures

have been subject to "strict historical limitation," and any forfeiture reaching beyond this limitation "is *ipso facto* punitive and therefore subject to review under the Excessive Fines Clause." 524 U.S. at 333 n.8. Holding the currency involved in the reporting violation here to constitute an instrumentality after the Supreme Court has recently held that the currency involved in a similar reporting violation in *Bajakajian* did not constitute an instrumentality would, at the very least, be in tension with the view that instrumentality forfeitures are strict[ly] ... limit[ed]."[3]

Moreover, the Supreme Court has never held that a non-contraband subject of criminal regulation can be forfeited as an instrumentality of an offense under that regulation. In this respect, the $85,000 obviously differs from the instrumentality forfeitures the Court has upheld, *e.g.*, the forfeiture of a distillery and related property used to produce illegal alcohol in *Dobbins's Distillery v. United*

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[3] Section 981, like the statutes at issue in *Austin* and *Bajakajian*, contains a defense for innocent owners of seized property. 18 U.S.C. § 981(a)(2). This might constitute another reason for refusing to characterize the forfeiture of $85,000 as an instrumentality forfeiture because both *Austin* and *Bajakajian* cite the innocent owner defense in support of the punitive nature of the forfeitures at issue in those cases. However, *Bajakajian*, in recognizing that instrumentalities can be forfeited in civil in rem proceedings without being subjected to any excessiveness inquiry, did not in any way suggest that an "innocent owner" provision supersedes the instrumentality inquiry. *See also United States v. 3814 NW Thinnan St.*, 164 F.3d 1191, 1197 (9th Cir.) (suggesting that even if § 981 is deemed punitive, a civil forfeiture under that statute will not be subject to the excessiveness inquiry if the property targeted by the in rem proceeding "meet[s] the 'instrumentality' test," quoting *Bajakajian*, 524 U.S. at 333 n.8), *amended on denial of reh'g*, 172 F.3d 689 (1999); *cf. United States v. Ursery*, 518 U.S. 267, 290, 292 (1996) (finding that § 981(a)(1)(A) "serve[s] important nonpunitive goals" and "[t]hough both §§ 881(a) and 981(a) contain an 'innocent owner' exception, we do not think that such a provision, without more indication of an intent to punish, is relevant to the question whether a statute is punitive under the Double Jeopardy Clause").

States, 96 U.S. 395 (1878), the forfeiture of a car used to violate a ban on interstate transportation of goods to avoid taxes in *J.W. Goldsmith, Jr.—Grant Co. v. United States*, 254 U.S. 505, 508 (1921), the forfeiture of fishing nets used to violate state fishing laws in CJ. *Hendry Co. v. Moore, 318 U.S.* 133 (1943), and the forfeiture of real property used to grow marijuana in *Ursery*, 518 U.S. at 267. Although it seems logically possible that the subject of a regulation could constitute an instrumentality of an offense under that regulation, the *Bajakajian* Court suggested to the contrary, distinguishing the traditional instrumentality in *Goldsmith* from the forfeiture before it in which "the currency is merely the subject of the crime of failure to report." *Bajakajian*, 524 U.S. at 334 n.9.

In sum, it is not clear whether the Supreme Court would hold that a forfeiture of structured funds constitutes an instrumentality forfeiture. We need not resolve that question in this case, however, because even if the $85,000 is not an instrumentality, and the Excessive Fines Clause applies, we conclude for the reasons that follow that forfeiture of these funds is not constitutionally excessive.

2.

Although the Supreme Court has not yet expressly so held, we believe that *Bajakajian's* "grossly disproportional" analysis applies when determining whether any punitive forfeiture – civil or criminal – is excessive.[4] Moreover, as

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[4] *Bajakajian, of* course, involved only a criminal in personam forfeiture, but the Supreme Court nowhere suggested that its "gross disproportionality" test did not apply to civil in rem forfeitures that are punitive in nature. Indeed, the Court implied the contrary by stating that "[the] touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality" and that it was enunciating "a standard" for "punitive forfeiture[s]." *Bajakajian*, 524 U.S. at 334 (emphasis added). Moreover, Justice Kennedy, on behalf of the four

Bajakajian instructs, we consider de novo the question of whether a forfeiture constitutes a constitutionally excessive fine, *see* 524 U.S. at 336 & n.10, and we place the burden on Ahmad, as the party challenging the constitutionality of the forfeiture, to demonstrate excessiveness. *See Bajakajian,* 524 U.S. at 348 (Kennedy, J., dissenting) ("[a] defendant must prove a gross disproportion. ..."); *see also United States v. Ladum,* 141 F.3d 1328, 1349 (9th Cir. 1998); *United States v. 829 Calle de Madero, 100* F.3d 734, 73 8 (10th Cir. 1996); *United States v. One 1970 36.9' Columbia Sailing Boat,* 91 F.3d 1053, 1057 (8th Cir. 1996).

Examination of the relevant factors identified in *Bajakajian* for assessing the gravity of the offense – the nature and extent of the criminal activity, other related illegal activities (such as drug dealing, money laundering, or tax evasion), the extent of the harm caused by the offense, and the maximum penalties a court could have imposed for the offense – renders inevitable the conclusion that Ahmad cannot satisfy his burden of demonstrating, that forfeiture of $85,000 in structured funds is constitutionally excessive.[5]

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dissenters in *Bajakajian,* acknowledged that the "grossly disproportional" standard was "a proper way to apply the Clause." *Id.* at 348. Furthermore, a number of our sister circuits have similarly concluded that the "grossly disproportional" standard does indeed apply to punitive civil forfeitures, thus filling the void previously left by the Supreme Court in *Austin,* 509 U.S. at 622-23. *See Towers v. City of Chicago,* 173 F.3d 619, 624 (7th Cir. 1999); 3814 NW *7hiirinan St.,* 164 F.3d at 1197; *United States v.* 415 *E. Mitchell Ave.,* 149 F.3d 472, 476-77 (6th Cir. 1998).

[5] In this case, the district court issued its decision prior to the Supreme Court's decision in *Bajakajian.* In finding the forfeitures to be excessive fines, the district court instead followed the Ninth Circuit's analysis in *United States v. Bajakajian,* 84 F.3d 334, 337 (9th Cir. 1996), *aff'd,* 524 U.S. 321 (1998), relying heavily (if not exclusively) on the fact that the government was deprived only of information, not revenue, as a result of the reporting offenses. Many of Ahmad's arguments echo this rationale.

As to the nature and extent of the criminal activity, although both the case at hand and *Bajakajian* involve the violation of reporting requirements, Ahmad's structuring did not violate a lone reporting duty imposed on him as an individual. Rather, his structured deposits were for a commercial purpose and caused a financial institution, First Virginia Bank, to fail on numerous occasions to comply with its reporting obligations. Ahmad's conduct may not have been willful, but he repeatedly structured transactions involving his clients' money to evade reporting requirements. The nature of Ahmad's structuring is thus readily distinguishable from the "single" reporting offense at issue in *Bajakajian*, in which the property owner, out of "fear stemming, from 'cultural differences,'" tried to take his own money out of the country without reporting it. 524 U.S. at 326, 337 n.12.

Like Bajakajian, Ahmad's underlying activities – making cash deposits with the bank and transferring portions of that money out of the country – were lawful activities. However, unlike Bajakajian's isolated reporting violation, Ahmad's structuring constituted part of a complicated larger scheme related to customs fraud violations. Ahmad acknowledged that he transferred some of the funds from his illegally structured deposits into Falcon's account so that Falcon could pay Pakistani manufacturers inflated purchase prices for imported surgical equipment. The structured transactions thus bore an intimate connection to the customs fraud. In contrast to Bajakajian, who on one occasion sought to use unreported funds to repay a lawful debt, *see* id. at 326, Ahmad repeatedly sought to use structured funds to violate

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We agree with the government, however, that "if any forfeiture where the United States was not deprived of revenue necessarily would constitute an excessive fine per se," *see* Brief of Appellant at 27, it would have been unnecessary for the Supreme Court in *Bajakajian* to identify and consider other factors relevant to the proportionality determination.

United States customs laws and to circumvent Pakistani monetary regulations.

In assessing the harm caused by the offense, the *Bajakajian* Court stressed that in the case before it, the harm was minimal because the offense resulted only in a loss of information to the government. In the present case, Ahmad's deposit structuring activities not only caused the government to lose information, but also implicated an intermediary actor, the First Virginia Bank, and affected its legal duty to report certain transactions. In addition, the structured deposits put at risk the funds of numerous Pakistani nationals living in the United States; only because "Ahmad borrowed funds in Pakistan and delivered the expected sums to the families of his customers in Pakistan," *see* Brief of Appellee at 9, did the government's seizure of the funds not deprive Ahmad's clients of their money.

The penalties that a court "could have ... imposed" for the conduct giving rise to the forfeiture here do mirror those in *Bajakajian* – a statutory maximum term of imprisonment of five years, a maximum fine of $250,000, or both, and a Guidelines recommendation of a term of imprisonment not more than six months, a maximum fine of $5,000, or both. *See* 31 U.S.C. §§ 5322(a), 5324(c)(1) (1994); U.S.S.G. § 2S1.3;[6] Bajakajian, 524 U.S. at 339 n.14. However, we do not believe that in this case these penalties "confirm a minimal level of culpability" as they did in Bajakajian, id. at 339, given the distinctions we have

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[6] We note that the Guidelines calculation extends Ahmad substantial lenience because it assumes that he did not know that the structured funds were intended to promote unlawful activity, *i.e.*, customs fraud. *See U.S.S.G. § 2S1.3.* Without the benefit of this assumption, Ahmad's base offense level could be calculated as high as 15, with a corresponding, maximum sentence of 24 months custody, a $40,000 fine, or both.

drawn with respect to the other factors relevant to evaluating the gravity of the underlying offense.

In sum, unlike Bajakajian's offense for which the government sought forfeiture of more than $350,000, Ahmad's conduct in violation of § 5324 was not a single, isolated untruth affecting only the government, but rather a series of sophisticated commercial transactions over a period of years that were related to a customs fraud scheme. Ahmad's structuring not only deprived the government of important information, but also affected a financial institution's ability to comply with the law and jeopardized the funds of other persons. For these reasons, Ahmad cannot demonstrate that forfeiture of the $85,000 traceable to the structuring offenses (less than one fourth of the forfeiture sought in Bajakajian) is grossly disproportional to those offenses.

C.

For many of the reasons stated above, on the undisputed facts here, Ahmad cannot demonstrate that forfeiture of the remaining amount of the defendant currency, $101,587.42, is grossly disproportional to the offenses under 18 U.S.C. § 545.[7] Even assuming that the

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[7] The government does not claim that the $101,587.42 constitutes an instrumentality forfeiture, but it does argue that the excessiveness analysis does not apply to the forfeiture of these funds for a different reason. The government contends that, even though § 545 does not require proof that the United States has been defrauded of "revenues," *see supra* Part III, and even though the customs violations here did not defraud the government of any revenues (because the surgical equipment was not subject to duty), § 545 is a traditional customs smuggling statute serving "entirely remedial" purposes, *Bajakajian*, 524 U.S. at 343 n.19, and so "beyond limitation under the Eighth Amendment." Brief of Appellant at 29. But *Bajakajian* expressly rejected a similar argument (albeit in the context of a criminal in personam forfeiture), explaining that remedial actions are "brought to obtain compensation or indemnity"

forfeiture is at least in part punitive, it does not violate the Excessive Fines Clause.

The nature of the § 545 offenses in the present case is defined by the use of fraudulent invoices that prevented Customs agents from accurately documenting the value of imported non-dutiable goods. Thus, these particular customs violations may arguably be considered a breed of "reporting offense," as was Bajakajian's failure to declare the actual amount of currency he was transporting out of the country. However, presenting Customs with false invoices constitutes an affirmative action and clearly worked a "fraud on the United States," unlike Bajakajian's failure to make a declaration. *Bajakajian,* 524 U.S. at 339. In addition, as with the structuring violations, the customs violations do not constitute a single isolated crime. Rather, fraudulent

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not information. 524 U.S. at 329 (internal quotation marks eliminated). Moreover, the Court emphasized that traditional customs smuggling forfeitures "vindicate[d] the Government's underlying property right in customs duties." Id. at 340. *Bajakajian's* extended discussion suggests that a modern statute, like § 545, which is not limited in purpose to compensating the government for lost customs duties, could not, contrary to the government's argument, be characterized as a traditional customs smuggling statute. Nor does *One Lot Emerald Cut Stones v. United States,* 409 U.S. 232 (1972), assist the government. That case involved a forfeiture pursuant to 19 U.S.C. § 1497 of gems subject to duty that had been smuggled into the United States. The *Emerald Cut* Court itself distinguished the statute at issue here, § 545, from the "civil and remedial" forfeiture under § 1497. *See id.* at 236-37. Moreover, although the *Emerald Cut* Court justified the forfeiture of gems not only as "prevent[ing] forbidden merchandise from circulating in the United States" but also as serving to "reimburse the Government for investigation and enforcement expenses," *id.* at 237, the second justification (the only one relevant here) was wholly discounted by the *Bajakajian* Court. *Bajakajian,* 524 U.S. at 343 n.19 ("The additional fact that such a remedial forfeiture also 'serves to reimburse the Government for investigation and enforcement expenses,' is essentially meaningless, because even a clearly punitive criminal fine or forfeiture could be said in some measure to reimburse for criminal enforcement and investigation.") (citations omitted).

invoices, for which Ahmad was responsible, repeatedly passed through Customs. The nature and extent of the criminal activity here, therefore, contrasts sharply with Bajakajian's isolated reporting violation.

As to related illegal activities, the importation of the surgical equipment was a legal activity and there is no evidence in the record that the currency itself – as substitute assets for the value of the imported surgical equipment – was tainted in any way by prior unlawful conduct. However, the § 545 violations were directly related to tax fraud because Falcon's president used the false invoices unlawfully in filing his tax returns, *see Ismail,* 97 F.3d at 54-55, and indirectly related to Ahmad's structuring violations because Ahmad used the invoices as a basis for extending bridge loans and disbursing rupees to Pakistani families as part of his money exchange business. *See supra* at 27-28. Bajakajian's one reporting crime, of course, had no similar relationship to sophisticated criminal activity which occurred over a number of years.

The harm caused by the § 545 offenses is far greater than that caused by the single § 5316 reporting offense in *Bajakajian.* The false invoices in this case not only deprived the government of accurate statistical information required by customs regulations, but they were also used by Falcon's president to commit tax fraud, causing the government to lose approximately $370,000 of tax revenue in 1990 and 1991. The fraudulent scheme also threatened the interests of Ahmad's clients by making the monetary disbursements to Pakistani families contingent upon use of the false invoices.

Finally, once again the maximum penalties a court could impose are identical to those in *Bajakajian. See* 18 U.S.C. §§ 545, 3559(a)(5), 3571(b)(3); U.S.S.G. § 2T3.1(a)(3) (defining "tax loss" as the amount of the duty). But again, in light of the differences between the case at

hand and *Bajakajian* as to the other factors, we do not believe that this diminishes the gravity of the fraudulent activity in which Ahmad was involved such that it is grossly disproportional to the $101,587.42 forfeiture.

In weighing all of these relevant factors, we can only conclude that Ahmad simply cannot demonstrate that forfeiture of the remaining $101,587.42 of the defendant currency is grossly disproportional to the gravity of the § 545 offenses. Repeatedly bringing merchandise into the United States as part of a sophisticated commercial operation to defraud the United States through the use of false invoices – invoices later used to commit tax fraud – constitutes substantially more serious criminal conduct than an individual's failure on one occasion to report accurately the amount of currency he was taking out of the country for a lawful, personal purpose, and which only deprived the government of information. The forfeiture of $101,587.42 (less than one third the amount sought to be forfeited in *Bajakajian) is* not grossly disproportional to the gravity of the customs fraud offenses, and so, even if punitive, does not violate the Excessive Fines Clause of the Eighth Amendment.[8]

IV.

For these reasons, the judgment of the district court is

REVERSED.

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[8] We have also carefully considered Ahmad's argument that the government impermissibly delayed instituting civil forfeiture proceedings in violation of his Fifth Amendment due process rights, and we find this argument meritless.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
July 21, 2000

No. 98-1467
CA-96-1633-A

UNITED STATES OF AMERICA

Plaintiff – Appellant

v.

SHAKEEL AHMAD

Claimant Appellee

and

$167,558.86 IN U.S. CURRENCY SEIZED FROM THE FIRST VIRGINIA BANK, ACCOUNT 90690044; $3,718.02 IN U.S. CURRENCY SEIZED FROM THE FIRST VIRGINIA BANK, ACCOUNT 93905491; $711.64 IN U.S. CURRENCY SEIZED FROM FIRST VIRGINIA BANK ACCOUNT 90690095; 8,296.90 IN U.S. CURRENCY SEIZED ON 10/25/93, FROM THE PERSONS OF SHAKEEL AHMAD AND ZAMIR AHMED; $5,000 POSTED

IN 1993 WITH THE INTERNAL REVENUE SERVICE AS A COST BOND W/RESPECT TO ADMINISTRATIVE FORFEITURE PROCEEDINGS AGAINST THE MONIES SEIZED FROM CERTAIN FIRST VIRGINIA BANK ACCOUNTS; $1,302 POSTED IN 1993 W/THE CUSTOMS SERVICE AS COST BOND W/ RESPECT TO ADMINISTRATIVE FORFEITURE PROCEEDINGS AGAINST MONIES SEIZED FROM SHAKEEL AHMAD AND ZAMIR AHMED; ZAMIR AHMED; MIAN AHMED

Defendants

v.

FIRST VIRGINIA BANK

Third Party Defendant

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the action; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. Sec. 545. Smuggling goods into the United States

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces or

attempts to smuggle or clandestinely introduce into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law –

Shall be fined under this title or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States", as used in this section, shall not include the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

18 U.S.C. Sec. 984. Civil forfeiture of fungible property

(a) This section shall apply to any action for forfeiture brought by the Government in connection with any offense under section 1956, 1957, or 1960 of this title or section 5322 or 5324 of title 31, United States Code.

(b)(1) In any forfeiture action in rem in which the subject property is cash, monetary instruments in bearer

form, funds deposited in an account in a financial institution (as defined in section 20 of this title), or other fungible property –

(A) it shall not be necessary for the Government to identify the specific property involved in the offense that is the basis for the forfeiture; and

(B) it shall not be a defense that the property involved in such an offense has been removed and replaced by identical property.

(2) Except as provided in subsection (c), any identical property found in the same place or account as the property involved in the offense that is the basis for the forfeiture shall be subject to forfeiture under this section.

(c) No action pursuant to this section to forfeit property not traceable directly to the offense that is the basis for the forfeiture may be commenced more than 1 year from the date of the offense.

(d)(1) No action pursuant to this section to forfeit property not traceable directly to the offense that is the basis for the forfeiture may be taken against funds held by a financial institution in an interbank account, unless the financial institution holding the account knowingly engaged in the offense.

(2) As used in this section, the term "interbank account" means an account held by one financial institution at another financial institution primarily for the purpose of facilitating customer transactions.